The Indiana Prosecutor September/October 2007

Electronic Citation and Warning System—November 1, 2007

On November 1, 2007, the Indiana State Police will begin using the Electronic Citation and Warning System, or "e-CWS" statewide to electronically issue and transmit traffic citations and tickets directly to prosecutors, courts and records management systems. The deployment of this program is a major accomplishment for the State of Indiana in the use of technology to issue citations, transmit data to courts, the BMV, and share data in an accurate and timely manner. Indiana continues to be the leader in the development of computer technology in the area of traffic law enforcement.

The development, implementation and deployment of e-CWS program are the result of the efforts of the Judicial Technology and Automation Committee (JTAC) in partnership with the Indiana Criminal Justice Institute (ICJI) and the Indiana State Police (ISP). The e-CWS system allows law enforcement officers to electronically issue traffic citations complete with court location and date at the time of the traffic stop and then electronically transmit the information to a central repository where it is accessible to clerks, courts, and prosecutors. The system is simple to use and reduces the time it takes to conduct a traffic stop and issue a citation significantly. All information about the motorist and the vehicle is automatically populated in the appropriate areas of the traffic citation by the swipe or scanning with a bar code scanner of the driver's license and registration by the law enforcement officer. The traffic ticket can then be printed and given to the motorist immediately at the site of the traffic stop and transmitted electronically to the central repository.

Inside this Issue

The e-CWS program itself is available at no cost to law enforcement. The bar code scanners and mobile printers are available to be purchased by law enforcement agencies. Motorcycle patrols will also be able to use the e-CWS system to issue traffic citations as hand held computer scanners and small compact printers are available for purchase by law enforcement agencies. Contact Annette Page at JTAC for details on obtaining the e-CWS and necessary equipment.

The e-CWS system presents a few concerns for prosecutors as far as ownership of the data and access to the data once it is transmitted to the central repository. Since the decision to file a charge, dismiss a charge, or defer a charge with the court is within the prosecutor's discretion, there are concerns about how and when the traffic citation is transmitted to the courts or accessible by the court staff from the central repository. In some counties, prosecutors prefer to review traffic tickets before they are filed with the court to determine eligibility for deferral, correctness, and so forth. In other counties, traffic tickets are filed directly with the courts. JTAC is diligently trying to work with individual counties and IPAC in resolving these issues. IPAC is presently working with JTAC to develop the interface between the e-CWS system and Pros-Link.

Enclosed is a Fact Sheet by JTAC about e-CWS and prototype copies of the actual ticket a violator and the courts would receive from the officer for the same stop. The JTAC website has an excellent online demonstration of the system at www.in.gov/judiciary/jtac/programs/ecws.html. Please take some time to read this information and become familiar with this system as all counties will be affected by this system starting November 1, 2007 when the Indiana State Police begin writing citations with it. Please feel free to contact IPAC or JTAC to let us know any concerns or questions that you have about the e-CWS system so that we can work together to resolve any issues or glitches if they arise and answer any questions.

Indiana Supreme Court Recent Decision

- *Indiana Supreme Court accepts transfer*

Jackson v. State, ___ N.E.2d ____ (Ind. Ct. App. 2007) was accepted for transfer. This case involves whether the State must prove actual notice that an Habitual Traffic Violator was suspended due to his HTV status. Here a notice of suspension was sent by the BMV to Jackson's last known address. Jackson had moved and had not updated his address with the BMV. The appellate court held that the State had not shown that the notice provided by the BMV was sufficient to show defendant had actual knowledge that he was suspended from driving as an Habitual Traffic Violator.

Indiana Court of Appeals Recent Decisions

- *Briggs v. State*, __N.E.2d __ (Ind. Ct. App. 9/11/07)

Police officers in Evansville routinely perform a service for their citizens called "stand-by assistance." When a citizen requests assistance in removing their belongings from a potentially volatile household, a uniformed officer will accompany the individual to maintain the peace during the process. In March of 2006, two Evansville Police officers, Officer Knight and Officer Evans, accompanied Gary Lanville to the home of Eric Briggs for the purposes of providing stand-by assistance. When officers knocked on the door Briggs answered and allowed them to enter his apartment. The lights were off in the apartment. Officer Knight switched on the lights and Briggs promptly turned them off. He then headed back to his bedroom which was also pitch black. Officer Evans asked Briggs to stop, but Briggs kept walking towards the dark room. When Briggs was asked a second time to stop he ignored the officers and kept walking. Officer Evans grabbed Brigg's arm and placed him in a chair. Briggs was asked for his name and date of birth but he refused to answer. Officer Evans "escorted" Briggs to his feet and Briggs began to struggle with the officers. Briggs was eventually forced to the ground and handcuffed. Lanville was then allowed to enter the apartment and retrieve his possessions which were already packed.

Briggs was charged with resisting law enforcement as an A misdemeanor and was convicted at trial. On Appeal, Briggs argued that the State failed to prove the officers were lawfully engaged in the execution of their duties when they stopped him. The court reviewed the officers action through an Overstreet analysis. The Court theorized that the officers entrance into the apartment was similar to a consensual encounter. Briggs opened the door allowing them to enter but when he walked away from the officers the consensual encounter ended. The officers at that time did not have reasonable suspicion that would justify an investigatory stop. When the officers asked Briggs to stop he was free to disregard their order. The court noted that officers have safety concerns but even a hunch that Briggs may have had a weapon was not sufficient to justify seizing Briggs. They held that Officer Evan and Officer Knight were not lawfully engaged in their duties when they grabbed Brigg's arm and placed him in the chair. Briggs' conviction was reversed.

Judge Friedlander disagreed with the majority decision. In a written dissent, he noted that the officers had not gone to the apartment to conduct an investigation but to assist in a peaceful retrieval of belongings. While he agreed that the situation extended beyond a casual encounter, Judge Friedlander felt that the critical point was Briggs consent to allow the officers in his residence. Had he not consented, the officers would have left and Lanville would have sought a court order to obtain his possessions. When Briggs consented to allowing the officers entrance into his residence, he also submitted to the reasonable procedures for retrieving the property which included obeying the officer's commands.

Knowing that Lanville's belongings were located in the back bedroom, the officers were reasonable in their efforts to keep Briggs away from that room when Lanville was present. The officers also had a valid concern for their safety. To follow the majority's analysis would require officers to wait until after violence occurred before they could intervene. Judge Friedlander found that the officers were acting within the execution of their duties when Briggs resisted their authority.

- *911 call did not constitute testimonial evidence.*

Collins v. State. __ N.E.2d ___ (Ind. Ct. App. 9/12/07)

Defendant Michael Collins lived in Marion, Indiana. His girlfriend lived in a duplex that was connected to

Continued on page 3

the home of Michele Jaynes and Kenny Kendall. When Collins could not locate his girlfriend, he enlisted the aid of Michelle and Kenny and another friend Jerry Downs to broaden the search. After searching for hours, the group began to party. Michelle and Kenny eventually went home. Shortly after they returned to their apartment, Collins showed up with a gun wanting Kenny to drive him around. When Kenny began to refuse Michelle interceded. She agreed to drive Collins and Downs around to look for Collin's girlfriend. At one point in the evening she called Kenny to tell him she loved him and their children. Collins shot and killed Michelle. He dropped Downs off at his house and then drove to a deserted area. Collins dosed the car containing Michelle's body with gasoline and set it on fire.

While Collins was disposing of Michelle's body, Downs called 911. Downs gave his name to the dispatcher and related that Collins had shot a lady named Michelle in a white vehicle. Downs was very upset stating that Collins had threatened to kill him if he told anyone about Collins' actions. At the time of the call, Downs did not know where Collins was located. After the call, an officer spotted Collins walking down the road. Collins was interviewed at the police station and eventually charged with murder, criminal confinement as a Class B felony, abuse of a corpse as a Class D felony, arson as a Class D felony, pointing a firearm as a class D felony, possession of a firearm by a serious violent felon, and as a habitual offender.

At trial, the State introduced the contents of Down's 911 call in lieu of his testimony. Collins objected to the testimony as a violation of his Sixth Amendment right to confront his accuser under *Crawford v. Washington*, 541 U.S. 36 (2004). The Trial Court admitted the statement. Collins was convicted on all counts and accordingly sentenced. On appeal, Collins renewed his Sixth Amendment claim.

The rule articulated in Crawford and later clarified by *Davis v. Washington* 126 S.Ct. 2266 (2006) states where a hearing implicates Sixth Amendment protection, the introduction of a testimonial statement of an absent witness violates the defendant's right to confront his accuser unless the defendant had a prior opportunity to cross examine the witness. To determine whether Down's statement to the 911 operator was testimonial in nature, the Court of Appeals reviewed factors established by Davis and later cited in *Gayden v. State*, 863 N.E.2d 1193 (Ind. Ct. App. 2007) .

> " (1) whether the declarant was describing past events or current events, (2) whether the declarant was facing an ongoing emergency, (3) whether the questions asked by law enforcement were such that they elicited response necessary to resolve the present emergency rather than learn about past events, and (4) the level of formality of the interrogation."

The Court found that while the call described a past event, the information served to notify authorities that Collins posed a present danger. Downs himself was also in danger and facing an ongoing emergency. Downs did not know Collins' location and faced the possibility that Collins would kill him if he were found on the phone talking to the police. The Court also noted that the questions asked by the 911 operator were designed to meet the ongoing emergency. Her query to establish Collins' identity, the type of vehicle he was driving and his location would have assisted the police in ending the emergency by arresting Collins. Finally, the Court found that the conversation was during an informal telephone call rather than during a formal police interrogation.

Based on these factors, the Court of Appeals found that the primary purpose of Down's statement to the 911 operator and the intent of the dispatcher was to respond to an ongoing emergency. Therefore, they found that the statement was not testimonial in nature and therefore was not prohibited by Crawford. The Trial Court was affirmed.

- *Prosecutorial Misconduct*

McKinney v. State, __ N.E.2d. ___ (Ind. Ct. App. 9/17/07)

Dominick Bruno and Anthony Laurenzo were close friends. On December 19, 2003 they went out to a strip club together. Before going into the club both men took some LSD. Laurenzo began hallucinating. He was yelling, crying, rubbing his chest and subsequently was ejected from the club. Bruno took Laurenzo back to the trailer that Bruno shared with his pregnant wife, Connie, and their child.

Continued on page 4

As Bruno was leaving the club with Laurenzo, he received a call from his wife that another friend, Chad McKinney, was at their trailer. Connie told Bruno that McKinney had been drinking and seemed down. She also asked him to come home. During the drive, Laurenzo began to swing his arms and talk with God. Laurenzo was so active Bruno had to pull over on several occasions to calm Laurenzo down.

When they arrived at the trailer, Laurenzo was still hallucinating. McKinney was lying on the floor near the door when they walked in and Laurenzo stepped on him. Laurenzo began swinging his arms again and struck McKinney who retaliated. McKinney pulled Laurenzo on the couch and began punching him. Bruno and Connie separated the men. Bruno explained that Laurenzo was not trying to hurt McKinney; he was just experiencing hallucinations from the LSD. Laurenzo continued ranting, claiming to be the strongest man in the world. Another fight broke out between McKinney and Laurenzo, and McKinney was asked to leave.

McKinney left but returned about ten minutes later with a Crown Royal Bag and a white glove. He took a pistol from the bag and fired a shot into the floor. Bruno told McKinney to leave again but he refused. McKinney put the gun on the entertainment center. Laurenzo continued to rant and Connie told him to sit down. He took several steps towards her as if he was going to hit her. She told him he wasn't going to hit her and he stopped. At that point, Connie called 911. While on the phone with the 911 dispatcher, McKinney walked over to Laurenzo, put him in a head lock and shot him in the head. Laurenzo fell to the floor, McKinney dropped the gun which broke on the floor and left the trailer. Laurenzo died of a gunshot to his head. The bullet passed through his head exiting on the opposite side.

McKinney was arrested and placed in the Marion County Jail. While there, McKinney told the guard he had a bullet in his hand. He removed the bullet with a razor blade and gave the bullet to the guard. Firearms expert, Dave Brundage, compared the recovered bullet to the gun left in the trailer and found it had been fired from the gun. Blood recovered from the barrel of the gun was identified through DNA testing as Laurenzos. The wound to Laurenzo's head indicated that something was resting against his skin at the time the fatal shot was delivered. The injury to McKinney's hand was consistent with it's placement at the time of the shooting.

The State charged McKinney with murder. At trial, Connie testified that she heard the gun fire and then saw Laurenzo fall. She was asked if she saw the gun and she answered no. Bruno testified that McKinney dropped the gun on the floor and it broke into pieces. Firearm examiner, Brundage, was asked whether in his opinion the gun would have broken after being dropped on the floor. He answered that accidentally dropping the gun on the floor would not have caused the gun to break. He explained that the magazine would have had to been removed and the slide would have had to been in a certain position before the gun would break. In his opinion that could not have occurred from an accidental fall to the floor.

After hearing all the evidence, the jury hung. During a retrial, Connie was once again asked if she had seen the gun after hearing the shot. This time Connie testified that she had seen the gun. After cross examination by defense counsel, the jury asked the question why had she changed her answer. Connie's response was that she had been assured that no matter what had happened, she and her children would be safe. Dominick's testimony changed as well. He provided more information about how McKinney had at one point put the gun in Laurenzo's mouth and threatened to blow his head off.

Firearm examiner Brundage also testified at the re-trial. During his testimony, Brundage was asked to disassemble the gun without the magazine being removed. After doing this, Brundage changed his opinion of whether the gun could break after being dropped. He was asked on cross examination whether he was changing his testimony from the first trial to which he answered in the affirmative. Brundage clarified that the magazine would not have to be removed from the gun before it could have been dismanteled, therefore making it more likely that the gun could have broken upon accidental impact.

McKinney was convicted of murder. On appeal, McKinney argued that the prosecutor committed misconduct when he failed to notify defense counsel that the State's witnesses had changed their testimony. McKinney alleged he was denied due process when he was not told prior to trial that the witnesses had changed their testimony. Because defense counsel did not object to the alteration in testimony at the time it happened, defense counsel had to prove fundamental error to succeed on this claim.

Continued on page 5

To succeed on a claim of prosecutorial misconduct the defendant must demonstrate that the prosecutor did indeed engage in misconduct and that the misconduct placed him in grave peril. To prevail on a claim that constituted fundamental error, the defendant must demonstrate that a fair trial was not possible or that the act caused a substantial potential for harm.

In reviewing the testimony changes of both Connie's and Bruno's testimony, the Court found the defendant had not demonstrated the first step. They found that the prosecutor's action did not rise to the level of misconduct. Under *Brady v. Maryland*, 373 U.S. 83 (1963), a prosecutor is under the duty to disclose evidence favorable to the defendant. Here the resulting testimony was not favorable to the defendant. In contrast the trial testimony further incriminated the defendant. Judge Vaidik, writing for the court, stated " Because this evidence was inclupatory rather then exculpatory, the prosecution did not breach its duty under Brady to disclose evidence favorable to the defendant and therefore did not commit prosecutorial misconduct."

The Court took a different view when looking at the changes in Brundage's testimony. As an expert witness, the court found the State held a higher duty to notify defense counsel when his opinion changed. Indiana Trial Rule 26(E)(1) provides prosecutors with a separate requirement to notify counsel of a change in an expert's testimony. As interpreted by the Court of Appeals that rule requires prosecutors to "seasonably supplement discovery responses with respect to the subject-matter and substance of an expert witness' expected testimony." *Camm v. State*, 812 N.E.2d 1127 (Ind. Ct. App. 2004). Here, Brundage changed his testimony while on the stand, not before he took the stand. The State had no notice that he would conclude that the gun could be disassembled without removing the magazine until he preformed the task in court. Therefore, under the circumstances the State did not commit prosecutorial misconduct. However, had the State known prior to trial that the expert's opinion had changed, it would have been required to notify defense counsel.

- *Residential Entry – Partial entry into a home is sufficient to satisfy the element of entry*

Robert Williams v. State, ___N.E.2d ___ (Ind. Ct. App. 2007) In May of 2006, Robert Williams went to the home of his girlfriend Missy Brown. When she opened the door and noticed that he had been drinking, Miss Brown told him to leave. Williams, not happy with being rejected, threatened to "beat (her) bloody." She called the police and Williams left but he returned an hour later. When Missy Brown again refused to let him in he walked around to the back of the house. Williams broke the bedroom window and started to crawl through. When the police arrived, Williams was standing in the yard covered with blood.

Williams was charged with residential entry and convicted by a jury. On appeal, he alleged that a conviction for residential entry couldn't stand because only his upper body entered the confines of the house. He argues that the residential entry statute requires that the entire body of the individual must invade the residence before the act constitutes entry.

Noting a lack of case law defining what constitutes entry for purposes of residential entry, the Court turned to residential burglary case law to aid in its analysis. *Penman v. State*, 163 Ind. App. 583, 325 N.E.2d 478 (Ind. Ct. App. 1975) states " a person has entered a structure when he essentially put himself in a position to commit a felony within the confines of the structure." Willams argued that the plain meaning of the word "entry," according to Webster's Dictionary, requires complete entry into the structure.

The Court noted that Indiana is not the only jurisdiction that defines entry as any breach of the threshold. Residential entry differs from residential burglary only in that it does not require the intent to commit a felony offense. To require a higher degree of bodily entry for the lesser offense than the more severe Burglary would lead to an absurd result. To believe that one could avoid a charge of residential entry by leaving a portion of his body outside the residence would not cure the behavior the law intends to discourage. "Partial entry into a home creates the same situation that the crime of residential entry is designed to deter in the same manner as a complete entry." The Court held that partial entry into a home is sufficient to establish the crime of residential entry.